

**FEDERAL COURT**

Court File No. T-2084-12

**BETWEEN:****UNITED AIRLINES, INC.**

Plaintiffs

**AND:****JEREMY COOPERSTOCK**

Defendant

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**WRITTEN REPRESENTATIONS OF THE PLAINTIFF**

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**REQUEST FOR AN ORAL HEARING**

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1. The Plaintiff hereby requests an oral hearing as soon as possible. It is submitted that the Defendant is once again trying to cause unnecessary delays in this proceeding. He sought an extension of time to March 31, 2014 to file his motion to compel answers on the ground that he had a heavy work schedule. On November 26, 2013, the Case Management Judge granted the Defendant an extension of time to February 28, 2014. On the very same day, the Defendant wrote to the Court to the effect that the Plaintiff's claim for damages "further discredits and undermines the Plaintiff's air of urgency" and raised the issue of whether the Plaintiff wished to or needed to amend its Statement of Claim. This was followed on December 13 and December 18 by further requests for direction to this Court by the Defendant. The Case Management Judge rendered an Order on January 3, 2014. The

Defendant waited until January 17, 2014 before appealing the matter and now seeks to have the matter heard in writing. The Plaintiff is concerned that the Defendant will use the present appeal and any delay necessarily incurred in obtaining a decision, as a pretext to seek once again an extension of time to file his motion to compel. Under the circumstances, the Plaintiff is requesting that the matter be heard at the next sittings of the motions court in Montréal.

## **PART I - OVERVIEW**

2. The present motion is an appeal from the Order of January 3, 2014 of Prothonotary Morneau, who is the case management judge in this proceeding.
3. Contrary to what is set out in paragraph 1 of the Defendant's Written Representations, the motion does not relate to the issue of whether an abandoned or withdrawn claim should be struck from a Statement of Claim and the Defendant awarded the costs thrown away, since there is in the present case no abandoned or withdrawn action or motion as contemplated by Rule 402 of the *Federal Courts Rules*.

## **PART II – FACTS**

4. The present proceeding is an action for copyright infringement and for trade-mark infringement and passing off. It was commenced on November 19, 2012.

- **Amended Statement of Claim, Tab 3 of Defendant's Motion Record page 10**

5. Prothonotary Morneau was appointed as case management judge in the present proceeding on February 6, 2013. On March 31, 2013, the two Plaintiffs named in the Statement of Claim as originally filed merged into a single entity, namely United Airlines, Inc. The Defendant refused to consent to the Plaintiff's amendment of the Statement of Claim to reflect the merger and to an Order setting the timeline for completion of upcoming steps in the proceeding. The Plaintiff had also asked the Defendant whether he would consent to a bifurcation order. In the absence of a consent, the Plaintiff had to bring a motion. By Order

of Prothonotary Morneau dated June 10, 2013, the Plaintiffs were authorised to amend their Statement of Claim and a schedule for the upcoming steps was rendered.

- **Order of Chief Justice Crampton, Defendant's Motion Record Tab 6, page 59**
- **Order of Prothonotary Morneau dated June 10, 2013, Tab 1 of Plaintiff's Responding Motion Record**

6. The examinations for discovery of both parties took place in August and October 2013. By Order of Prothonotary Morneau dated November 26, 2013, the deadline for the filing of the Defendant's Motion to Compel was extended to February 28, 2014.

- **Plaintiff's Responding Motion Record, Tab 2**

7. The Plaintiff conducted the examination for discovery of the Defendant on the issue of damages. In view of the answers provided by the Defendant, the Plaintiff advised the Defendant that "it will not be claiming monetary compensation in the present proceeding for the infringement of its rights".

- **Defendant's Motion Record Tab 8, page 66**
- **Defendant's Motion record, Tab 8, page 77**

8. On December 13, 2013, the Defendant wrote to the case management judge requesting a direction with respect to the Amendment of the Statement of Claim, the thrown away costs and for a Word or Excel file of United's undertakings and refusals chart. In that letter, the Defendant characterises its request that the Plaintiff remove paragraphs (h) and 31 from the Amended Statement of Claim "as these may cause unnecessary confusion, and may be prejudicial for me at trial". The Defendant filed no material in support of his request except the exchange of correspondence with counsel.

- **Defendant's Motion Record, Tab 8, page 69**

9. By Order dated January 3, 2014, Prothonotary Morneau held that there was no need for an amendment to the Plaintiff's Statement of Claim as he was satisfied with the Plaintiff's approach and position as expressed in the letter dated December 17, 2013 from counsel, namely that the Plaintiff would address the fact that it was not seeking monetary compensation from the Defendant in its pre-trial conference memorandum. Prothonotary Morneau further held that the Plaintiff would not be subjected to costs thrown away "since the Court accepts that it is the conduct and the answers provided during the discovery of the Defendant that led the Plaintiff not to seek further damages under its claim".

- **Defendant's Motion Record, Tab 8, page 77**
- **Order of Prothonotary Morneau dated January 3, 2014, Defendant's Motion Record, Tab 2, page 5**

10. The Defendant sets out both at paragraph 4 of its representations to the Court as well as in a multiplicity of letters to the Court that he is self-represented. On that issue, the Plaintiff wishes to draw to Court's attention to paragraphs 8 and 9 of the Defendant's affidavit to the effect that he retained counsel both for his own examination for discovery and for the conduct of the discovery of the Plaintiff. Furthermore, the Defendant refers to the relative size of the parties. It is submitted that this is not a relevant consideration. The Plaintiff is the owner of trade-marks and copyright registrations and is seeking to protect its intellectual property rights. The defendant has engaged in a course of action which has led to this proceeding being commenced. The Defendant, whether or not he is an individual or is or is not self-represented, is not accorded different rights or obligations as a result.

- **Defendant's Motion Record, Tab 9, page 84**
- **Defendant's Motion Record, Tab 8, page 63**
- **Defendant's Motion Record, Tab 4, pages 46-47, paragraphs 27-32**

### **PART III – ISSUES**

11. The three issues for determination by the Court are as follows:

- (i) should the Order of Prothonotary Morneau dated January 3, 2014 be set aside;

(ii) does the conduct of the Plaintiff in advising the Defendant that the Plaintiff will not be claiming monetary compensation for the infringement of its rights amount to abandoning or withdrawing an action or motion pursuant to Rule 402 of the *Federal Courts Rules*;

(iii) should the Court answer both questions (i) and (ii) in the affirmative, are there costs thrown away as a result.

#### **PART IV – STANDARD OF REVIEW**

12. The standard of review of a discretionary Order of a Prothonotary is clear. Such an Order should only be reviewed *de novo* if the question raised in the motion is vital to the final issue in the case, or the Order is clearly wrong, in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

- ***Merck & Co v. Apotex Inc.* 2003 FCA 488, Plaintiff's Responding Record, Tab 5**

13. The issue of whether the Statement of Claim needs to be amended to delete paragraphs therefrom is not vital to the final issue in the case.

- ***Canada (AG) v. United States Steel Co.* 2011 FC 226, Plaintiff's Responding Record, Tab 6**

14. Even if the question was vital to the final issue of the case, the Federal Court of Appeal has held *in obiter* that the Court should defer to the factual findings and assessments of the Prothonotary even where they raise a question vital to the final issue of the case.

- ***Apotex Inc. v. Bristol Myers Squibb Co.* 2011 FCA 34, Plaintiff's Responding Record, Tab 7**

15. Furthermore, in this case, the Order was rendered by the case management judge and the Court has held that it will only interfere with an Order issued by a case management judge acting in that capacity in the clearest case of a misuse of judicial discretion.

- **Constant v. Canada (2012) 2012 FCA 89, Plaintiff's Responding Record, Tab 8**
- **Hardy Estate v. Canada (A.G.) 2012 FC 548, Plaintiff's Responding Record, Tab 9**
- **Mushkegowuk v. Canada (A.G.) 2011 FCA 133, Plaintiff's Responding Record, Tab 10**

16. The Court should give no or little weight to the affidavit filed by the Defendant and its exhibits, except where the exhibits already form part of the Court's record since an appeal from an Order of a prothonotary is to be decided on the basis of the material that was before the Prothonotary.

- **Shaw v. Canada 2010 FC 577, Plaintiff's Responding Record, Tab 11**

17. With respect to paragraphs 35, 36 and 37 of the Defendant's Written Representations, there was no misapprehension of facts by the case management judge and it is submitted that the Defendant cannot contend that the Prothonotary had no basis for rendering his decision because he did not have the transcripts of the examination for discovery. The Defendant chose to seek directions from the Prothonotary and put before the Prothonotary the material he viewed as relevant (which included his calculation of the costs thrown away based on the number of pages of transcript). Furthermore, the transcripts of the examination for discovery are not relevant or determinative of the application of Rule 402. The facts before the Prothonotary were clearly set out in the letters written by both parties to the Court and it is clear from the Order of the Prothonotary dated January 3, 2014 that he considered those facts in rendering his decision.

- **Order of Prothonotary Morneau dated January 3, 2014, Defendant's Motion Record, Tab 2, page 5**

18. With respect to paragraphs 38 and 39 of the Defendant's Written Submissions, the Prothonotary provided reasons in his Order of January 3, 2014 by indicating that he was satisfied with the Plaintiff's approach and position as expressed in the letter of December 17, 2013 and then explained why there were no costs thrown away. In any event, it is settled that even a lack of written reasons is not a ground of appeal.

- **Order of Prothonotary Morneau, Defendant's Motion Record, Tab 2, pages 5 and 6**
- **Novopharm Ltd v. Nycomed Canada Inc. 2011 FC 109, Plaintiff's Responding Motion Record, Tab 12**

19. It is respectfully submitted that there is no basis for this Honorable Court to set aside the Order of Prothonotary Morneau since the question raised is not vital to the final issue in the case and the Order is not clearly wrong.

#### **PART V – SUBMISSIONS**

20. The Defendant submits that the Plaintiff in advising that it would not seek monetary compensation from the Defendant for the infringement of its rights, has abandoned or withdrawn a claim. The Defendant alleges that the Plaintiff should amend paragraph (h) and 31 of the Amended Statement of Claim. Paragraph 31 of the Statement of Claim, reads that the "Plaintiff has suffered and continues to suffer considerable damage whereas the Defendant has made and continues to make illegal profits". The fact that the Plaintiff has made the decision not to claim monetary compensation from the Defendant for the infringement of its rights does not detract from the fact that the Plaintiff has suffered and continues to suffer damages. It is submitted that this is of itself sufficient to deal with the request that the Statement of Claim be amended to remove paragraph 31.

21. The Defendant relies on Rule 402 as the basis for his request that the Statement of Claim be amended. Rule 402 reads as follows:

"402. Costs of discontinuance or abandonment

Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party". (emphasis added)

• **Defendant's Motion Record, Tab 10, page 101**

22. It is clear that the present situation does not fall within the confines of Rule 402. Rule 402 relates to two instances, the discontinuance of a proceeding under Rule 165 or the abandonment of motion under Rule 370. It is submitted that the Defendant misconstrues the ambit of Rule 402, which Rule is silent as to a "claim".
23. With respect to paragraphs 19 to 28 of the Defendant's written representations, reference is made to Rules 181, 182 and 221. These rules bear no direct relevance to the matter at hand. Rule 181 relates to particulars, Rule 182 to the contents of a statement of Claim and Rule 221 to a motion to strike. The Defendant sought a direction from the case management Judge in respect of what the defendant characterized as a "withdrawn/abandoned claim" and the costs thrown away as a result. Both of these notions flow from Rule 402.
24. The Defendant cites no authority for the proposition that the narrowing of issues for trial falls under rule 402. The jurisprudence relied upon is not on point and further deals with the rules of practice in Ontario and Nova Scotia.
25. Furthermore, the Defendant cannot proceed on appeal to have paragraphs struck from the Plaintiff's Statement of Claim under Rule 221(b) and (d) (see paragraph 21 of the Defendant's written submissions) when the Defendant did not proceed on that basis before the case management Judge and cannot on appeal convert its request for directions to the case Management Judge and the Order that flowed from it into an appeal on a motion to strike. In any event, the Plaintiff respectfully submits that the matter at hand does not fall within the confines of Rule 221. Paragraphs (h) and 31 of the Statement of Claim cause no prejudice to the Defendant, which prejudice is characterized by the Defendant in paragraph 26 of his written representations as confusion and uncertainty. The Plaintiff submits that there is no confusion or uncertainty. Paragraph (h) will be addressed in the pre-trial



conference memorandum and paragraph 31 is relevant to the issues pleaded, including passing-off.

- **Apotex Inc v. Glaxo Group Ltd. 2001 FCT 1351, Plaintiff's Responding Motion Record, Tab 13**
- **Hässle v. Apotex Inc. 2008 FCA 88, Plaintiff's Responding Motion Record, Tab 14**

26. The purpose of discovery is to promote fairness and efficiency of the trial, with a view to better defining and narrowing the issues.

- **Bell Helicopter Textron Canada Limitée v. Eurocopter 2010 FCA 142, Plaintiff's Responding Motion Record, Tab 15**

27. It is common practice that the issues for trial are narrower than those initially pleaded, without the requirement of amendment of the pleadings. Rule 263 of the *Federal Courts Rules* specifically provides that simplification of the issues in the action are to be addressed at the pretrial conference. The Plaintiff, in its letter to the case management judge on December 17, 2013, provided that the pretrial conference memorandum would specifically address this issue.

- **Rule 263 of the Federal Courts Rules, Plaintiff Responding Motion Record, Tab 4**
- **Abbvie Corporation v. Janssen Inc. 2014 FC 55, Plaintiff's Responding Motion Record, Tab 16** (excerpt provided to highlight that scope of relief claimed in terms of infringement was narrowed at trial compared to Statement of Claim)
- **Apotex Inc. v. Bristol Myers Squibb Co. 2011 FCA 34, Plaintiff's Responding Motion Record, Tab 7**

28. With respect to paragraphs 29 to 34, the Plaintiff respectfully submits that since there is no abandoned or withdrawn claim, there is no issue of costs thrown away. In any event, questions needed to be asked during the examination for discovery on the issue of damages since the Plaintiff is pleading passing off. As such, discovery on the issue was necessary, even if the Plaintiff will not seek monetary compensation from the Defendant for the infringement of the Plaintiff's rights.

**PART VI – ORDER SOUGHT**

29. The Plaintiff respectfully requests that the present appeal be dismissed with costs payable forthwith to the Plaintiff.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

DATED at Montreal, Quebec, this 27<sup>th</sup> day of January, 2014

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